Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,

v.

THE CITY OF MORGANTON, NORTH CAROLINA;
MAYOR MEL COHEN, in his official capacity;
CITY MANAGER DOUGLAS O. BEAN, in his official capacity;
and COUNCIL MEMBERS ROBERT H. CHOATE,
MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and
DANNY H. LINGERFELT, in their official capacities,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment permit a city government to use its franchising authority to silence a private cable television operator and prohibit service by other private companies in order to establish a government monopoly over the medium of cable television?

2. In reviewing actions by a city government that abridge speech and restrict private media activities while granting the government the exclusive power to operate a particular medium of expression, are the federal courts required to make an independent review of the facts and circumstances purporting to justify the government restriction, or must the courts defer to the findings of the city council as a "legislative body"?

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Madison Cablevision, Inc.* Respondents, defendants in the district court and appellees in the court of appeals, are The City of Morganton, North Carolina; Mayor Mel Cohen, in his official capacity; City Manager Douglas O. Bean, in his official capacity; and Council Members Robert H. Choate, Mollie M. Darwin, Alfred W. Hamer, Jr., and Danny H. Lingerfelt, in their official capacities.

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* Madison Cablevision, Inc.'s stock was acquired in 1980 by Madison Communications, Inc., a Delaware corporation, which was an indirect wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). The intermediate subsidiary corporations were Cable Investments, Inc. and TCI Growth, Inc. Since that time, a corporate restructuring has transferred Madison's operations, with the consent and approval of the City of Morganton, to TCI Cablevision of North Carolina, Inc., a corporation which is likewise an indirect wholly-owned subsidiary of TCI.

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PETITION FOR WRIT OF CERTIORARI

Madison Cablevision, Inc., ("Madison") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported. The opinion of the district court in this case (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1991. (Pet. App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

This case arises from the unprecedented action of a city government ordering a private cable television company out of business, rejecting service proposals by two other private companies and establishing a government monopoly over cable television—a medium of expression protected by the First Amendment. When asked to review the serious constitutional issues raised by the city's actions, the district court dismissed the case, without making an independent evaluation of the city's purported justification for its restrictions on speech, finding as a matter of law that the court was precluded from making a judicial determination of the disputed facts, but was instead obligated to defer to the findings of the city council as a "legislative body." The court of appeals affirmed in a *per curiam* opinion on the basis of the district court decision. Petitioner seeks review by this Court of the city's appropriation for itself of an arm of the modern press and of the lower courts' wholly deferential response to that extraordinary assertion of government power.

Madison Cablevision, Inc. ("Madison") and its predecessor, another private company, have provided cable

television service in Morganton, North Carolina for more than twenty years. Some years prior to the impending expiration of Madison's nonexclusive franchise in 1986, the city began to explore the possibility of establishing a municipal cable television system to complement its municipal electric system and provide additional revenue for the city. The efforts of the private cable companies had long since been successful in convincing the citizens of the value of cable television, and the advent of satellite-delivered programming in the early 1980's, such as HBO and the Disney Channel, helped push subscribership on the cable system to more than 70% of the households in the community.[1] The city hired consultants and a Washington, D.C. law firm to assist it and commissioned a feasibility study to see whether a municipal cable system would be profitable under such conditions. Not surprisingly, the consultants concluded that a municipal system could be profitable if it achieved the same 70% subscriber level that Madison enjoyed.

The consultants' feasibility study did not explain what would happen to Madison or its system, and the study offered no explanation for the consultants' assumption that all the customers of Madison's cable system would become customers of the city's proposed municipal cable system. The report does make clear, however, that the proposed municipal system could not reach its projected level of profitability without attracting all of Madison's existing subscribers.

Neither Madison nor the public were informed about the consultants' conclusions, but the city continued to refuse to negotiate a renewal of Madison's franchise. On September 24, 1984, the city announced that it was issuing a request for franchise proposals and that it would consider at the same time whether to construct a system

[1] Continued expansion of the cable system and its services have increased that percentage. Now more than 80% of the households in Morganton are subscribers to Madison's system.

to be owned and operated by city government. Madison was then notified that its request for renewal of the franchise would be considered at the same time.[2] Applicants were given 30 days to submit franchise proposals and to prepare the voluminous response called for in the city's request for proposals. A public hearing before the city council involving all interested parties had been scheduled as part of the initial announcement by the city and was held several weeks after submission of the proposals. Parties were instructed, without explanation or additional guidance, to submit any additional information within 30 days of the hearing. Following this abbreviated and accelerated period for submission of proposals and public hearing, the city and its consultants and attorneys spent almost a full year drafting the city council opinion and related reports that constitute the "record" relied upon by the district court.

On September 9, 1985, the city council adopted the extraordinary ordinance that gave rise to this litigation. The city council decided (a) to establish a city owned and operated cable television system; (b) to deny Madison's request for renewal of its franchise; (c) to deny the franchise applications of the other two private companies; and (d) to prohibit (for a period of five years) the provision of cable television service in Morganton by anyone in competition with the city's cable television system.[3]

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[2] The September 24, 1984 notice was issued just prior to enactment of the Cable Communications Policy Act of 1984 (47 U.S.C. § 521 *et seq.*) (the "Cable Act") and enabled the city to argue that Madison was not entitled to the renewal protections of the Cable Act. The district court concluded that Madison was not entitled to those protections since there were fewer than 30 months remaining on the term of the franchise on the effective date of the Cable Act. The court of appeals affirmed that determination without comment. Madison does not seek review of that decision.

[3] In its ordinance, the city council ordered Madison to submit a plan within 90 days for removal of its equipment and lines from the

Madison sought review in the district court of the city's actions. The city moved immediately for summary judgment based on the "record" of its franchising process. Madison opposed the motion with affidavits and sought discovery from the city on the contested issues of fact, including the capacity of the rights-of-way in Morganton to accommodate more than one cable system. The city's motion for a protective order was granted and Madison was barred from all discovery. Based solely on the materials and the lengthy city council opinion presented by the city, the trial court granted summary judgment for the city, finding that it was obligated to defer to the city council's legislative determination.[4] Indeed, the dis-

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city's poles and rights-of-way. When Madison failed to submit such a plan, the city council scheduled a meeting to take further action against Madison. At that point, Madison commenced the action that is the subject of this petition. At the suggestion of the city, and with the consent of Madison, the district court later entered an order preserving the *status quo* and allowing Madison to continue to provide cable service during the pendency of the litigation. (Pet. App. E). Madison continues to serve its subscribers in Morgtanon and the city has not yet notified Madison when it will be required to terminate its service. The city has not constructed its proposed municipal system and no alternative cable service is currently available. A local citizens' initiative and petition drive has forced the city to call an election, which is scheduled for March 10, 1992, on whether the city should proceed with its plans to establish a municipal monopoly or allow service by competing private cable companies, including Madison.

[4] Following submission of briefs and oral argument, the district court initially determined that certain of Madison's state claims raised "difficult and unsettled" issues of state law which should be resolved in state court. Madison was instructed to institute an action in state court and the federal proceeding was stayed. (Pet. App. D). The district court retained jurisdiction of the federal claims and certain pendent state claims, including a state free speech claim under Article I, Section 14 of the North Carolina Constitution, pending resolution of the specified issues in state court.

In accordance with the district court's abstention order, Madison filed an action for declaratory judgment in the Superior Court of Burke County on whether the city's plans violated the "public pur-

trict court refused even to consider the evidence offered by Madison to contradict the findings of the city council:

> Madison has submitted affidavits challenging the factual basis for the Council's decisions. It appears that it is contending that each factual finding made by the Council should be retried by a jury. However, the issue before the Court is not whether the Council made the right decision, but whether the evidence before the Council when it adopted the ordinance was adequate to support the decision. It must be remembered that the City Council of Morganton is a legislative body. (Pet. App. 13a).

The trial court concluded, on the basis of the city's record, that the decision to limit cable service to a single operator furthers the "substantial government interests" of preventing disruption of city streets and rights-of-way, conservation of space on city utility poles and ensuring that public rights-of-way are optimally used. Madison sought to offer evidence on these issues, particularly to prove that at least one cable line could be added on the existing utility poles or placed underground in the rights-of-way without undue disruption. The district court refused to consider this evidence, erroneously adopting the city's view that it could properly consider only the evidence previously considered by the city council:

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pose" provisions of the North Carolina constitution and on questions of state law on antitrust, monopoly and exclusive privileges issues. The Superior Court granted summary judgment on those claims for the city without opinion. On appeal, the North Carolina Supreme Court affirmed the decision of the Superior Court, but noted pointedly that it had not been asked to rule on whether the city's actions violated the free speech provision of the North Carolina Constitution. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

Following the ruling by the North Carolina Supreme Court, the city renewed its motion for summary judgment in the federal district court. Madison restated its opposition to the motion, renewed its request for discovery and sought leave to amend the pleadings. The motion for leave to amend and the request for discovery were denied, and summary judgment was entered against Madison on all its claims for relief.

> Because the Court has determined that the case should be decided on the basis of the record before the Council, the affidavits [offered by Madison] are irrelevant. (Pet. App. 19a-20a).

As a result, the district court concluded that no further analysis was required to satisfy the First Amendment:

> The Council's decision not to franchise more than one cable operator clearly passes muster under *O'Brien* [*United States v. O'Brien*, 391 U.S. 367 (1968), which provides the applicable First Amendment standard] in light of the evidence before it [the city council] . . . (Pet. App. 18a).

On this basis, both the district court and the court of appeals sanctioned the city's decision to establish a government monopoly over cable television.

REASONS FOR GRANTING THE WRIT

This is not a case of mere limitation on freedom of speech and the press—this is a case of total usurpation by the government of the press role for itself. By using its franchising authority to shut down the existing private cable television system and by prohibiting service by other private companies, the city government has granted itself a monopoly over the medium of cable television in Morganton. Here, the government's duty to balance speech interests against "other societal interests," as contemplated by this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), has not resulted in an accommodation of private speech and public convenience, but in *no* private speech. Plenary review by this Court is essential to ensure that the uncertain boundaries of First Amendment protection for cable television are "shaped" rather than obliterated.

Cable television franchising is essentially a form of government licensing of speech and press. This Court has long recognized that the First Amendment limits gov-

ernment authority to condition the right to speak upon the grant of a government license. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). As the Court has noted, attempts to license speech present troubling prospects of government favoritism and censorship. *See Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). At the very least, the imposition of licensing requirements, and their use to deny opportunities for speech, require exacting judicial scrutiny.

The need for careful scrutiny is all the more compelling when a government decides to license only a single speaker, and then concludes that the government itself should be the recipient of the sole license. The courts below saw their role differently, however, choosing instead to defer entirely to the judgment made by the city on the basis of a "legislative record." This judicial approach is wrong on at least two counts: first, even if the "record" is taken at face value, it does not justify the extraordinary step of allowing the city to confer upon itself a monopoly over speech provided by means of cable television; and, second, it is quite wrong for a court deciding First Amendment issues to abdicate the responsibility of independent fact-finding in favor of reliance on a record developed by the government imposing the restriction on speech. *See Preferred*, 476 U.S. at 496. Both issues are important and warrant the attention of this Court.

I. NO GOVERNMENTAL INTEREST IDENTIFIED BY THE CITY IS SUFFICIENT TO JUSTIFY A GOVERNMENT MONOPOLY OF CABLE TELEVISION

Cable television is a medium of expression protected by the First Amendment from unwarranted government intrusion. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Leathers v. Medlock*, 111 S.Ct. 1438 (1991). In selecting the material to be of-

fered over a cable system, the operator serves as an editor or publisher, choosing from many alternative sources, the range of news, sports, weather, cultural, religious, political and other programming that will be offered.[5] Where this editorial responsibility is regulated by government, the government will inevitably be drawn into making and shaping political and religious choices—a role for which government is not only unsuited, but a role which the First Amendment seeks to reserve for private discretion free of government control. *See Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986). For that reason, government licensing schemes affecting speech are inherently suspect.

In the last few years there has been a significant increase in the number of government-owned cable television systems. During the same period, cable television has become an increasingly important source of news and information for the public. On the local level, more and more cable systems are originating their own programs, editorializing on local issues and providing a forum for citizens to express their views. In smaller communities like Morganton, not served by any local television service, the cable television system is the only potential source

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[5] Cable television was originally devised as a method for improving reception of over-the-air broadcast television and of extending television service to areas that could not be reached by traditional broadcast signals. In the mid-1970's, as a result of technological improvements made possible through orbiting communications satellites, a new and unique source for programming was created, resulting in the well-known services like HBO, CNN, C-SPAN, and ESPN. This dramatic change in the nature of the medium has greatly expanded the editorial role of the cable operator, making that function virtually indistinguishable from the role of the newspaper editor who selects syndicated columns, comics, opinion pieces, feature articles, wire service stories and other materials to be offered as a single package.

for such local expression of political views through television. By their nature, such views will sometimes be critical of local officials. As recent filings with this Court indicate, government competition with private media raises concerns about unfair competition that may lead to suppression of private speech. *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2839 (1991); *Paragould Cablevision, Inc. v. City of Paragould & The Paragould Light And Water Commission, et al.*, 930 F.2d 1310 (8th Cir.), *cert. denied*, 112 S.Ct. 430 (1991). This case presents a far more extreme problem: an outright ban on private speech through cable television and a government monopoly of the medium. A government decision of that magnitude—that government *alone* will make the necessary editorial decisions on television service for the community—obviously warrants especially exacting scrutiny by reviewing courts.

A respected commentator has stated flatly that "one of the necessary conditions for freedom of the press is the absence of government attempts to replace the private sector press with a government press." John E. Nowak, "Using the Press Clause to Limit Government Speech," 30 Ariz. L. Rev. 1 (1988). Government is not, and should not be, responsible for deciding what articles its citizens read or what programs they view. *See also Legi-Tech v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) ("[t]he evils inherent in allowing government to create a monopoly over dissemination of public information in any form seem too obvious to require extended discussion"). Yet the very purpose of establishing and operating an arm of the press as a government entity is to take on this function—to establish the government in an editorial role —and to make what was formerly a private decision into a governmental one. The inescapable result is to redefine the opportunities for speech, increasing government control at the expense of private control.

Where the government imposes a monopoly for itself on speech through a particular medium, the First Amendment would be meaningless unless the courts require genuine proof of the necessity of such a ban. The city council's curtailment of Madison's right to continue to provide cable service and its ban on service by other private operators can be permitted only if the city can prove convincingly each of the elements required under the analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), i.e., that (1) the government regulation is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.[6]

Overlooking for the moment the serious factual disputes in this case, it is readily apparent that the district court gave only the most cursory attention to the interests advanced to justify a city-controlled monopoly on the medium of cable television. Not only did the district court fail to give proper regard to the speech interests at stake, it largely accepted at face value the assertion that the city's action was essential to achieve its goals and not unduly restrictive of First Amendment rights.[7]

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[6] Sometimes referred to as the "incidental burdens" test, the *O'Brien* rationale has traditionally been used to judge government actions that limit speech only "incidentally" in the course of regulating some conduct or other non-speech activity that is otherwise subject to regulation. In other words, the *O'Brien* test is most appropriately used where the regulatory focus is not on speech at all, but on other, non-speech activity. Here, by contrast, the courts are called upon to measure the propriety of direct government control of First Amendment activity, and the test suggested by *O'Brien* should be applied with great sensitivity to protect speech interests from unnecessary government intrusion.

[7] The district court's failure to apply the constitutionally required test properly is hardly subject to debate since the district court

But the interests advanced by the city—ranging from claims that its monopoly of cable television was necessary to prevent the dangers flowing from an "unregulated monopoly" to claims that it would prevent disruption of city streets—carry no such weight. In fact, none is important enough to justify curtailment of constitutional rights, and all can be served through less drastic, and more effective measures.

A few examples will suffice. In deciding that the city could properly "prevent the dangers flowing from unregulated monopoly control over scarce resources," the district court never gives any indication that the "regulation" to be permitted is over a medium of speech. Even assuming that two or more competing cable systems could not survive financially in Morganton, (but see pages 15-19 *infra*), it hardly follows that this sort of market limitation opens up an increased role for government in the regulation of speech. Indeed, this Court has firmly rejected the idea that economic scarcity justifies greater government control over the media. In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a Florida statute requiring newspapers to provide free space to reply to published attacks on a political candidate's personal character, even though it recognized that "one-newspaper towns" were the norm. If the "natural monopoly" held by a single newspaper could not justify the limited intrusion on the media's discretion represented by the Florida law, it certainly would not justify the city's actions in this case.

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expressly declared that it was *not* obligated to review the city council's decision *de novo*, but was instead required to accord maximum deference to the city council as a legislative body. (Pet. App. 13a). This erroneous view led the district court to make serious evidentiary and procedural errors that would justify reversal independently. More importantly, however, it underscores that the district court weighed the interests at stake using a presumption that is exactly the opposite of the one required by the First Amendment.

See Quincy Cable TV, Inc. v. Federal Communications Commission, supra.

If the "unregulated monopoly" argument is a veiled suggestion that the city's cable service might be cheaper for subscribers—a fact that is in genuine dispute even in the record before the city council—the obvious remedy would be to allow the city system to compete with the private system and let the subscribers choose the service they think represents the better value. That is certainly a less restrictive alternative more in keeping with both the First Amendment and free enterprise. Moreover, this Court has not permitted economic or financial considerations of that sort to justify infringement of First Amendment rights. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The idea of replacing the private media, or even restricting their activities through government control, in order to make speech less expensive is completely inconsistent with First Amendment principles. Any legitimate concerns the city might have about the effects of allowing Madison to continue in business with only limited direct competition can be adequately met by the imposition of reasonable minimum service requirements for all cable service providers, including Madison, or by allowing additional competition from other private companies. But the courts below simply ignored these obvious alternatives.

The courts below also relied on the asserted interest in preventing disruption of city streets. But, whatever legitimacy that interest may have in other contexts, it hardly carries force when the city advances it in support of a plan to tear out an existing system and replace it with a new one. It is readily apparent, in fact, that allowing Madison to continue, or expand, its existing system would entail the least disruption; allowing it to expand at the same time that the necessary pole modifi-

cations and other changes are made for a second system involves only slightly more disruption, if any. Furthermore, disruption could be minimized through scheduling, sharing of facilities and other far less drastic measures than municipal monopoly of cable television. Yet the courts below made no effort whatever to determine whether the ordinance adopted by the city was necessary to advance this supposed interest or not.[8]

The deferential attitude adopted by the courts below in this case is in marked contrast to the decisions of other lower courts in their continuing efforts to shape the contours of First Amendment protections for cable television in accordance with this Court's decision in *Preferred*. *See Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D.Cal. 1986); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954 (N.D.Cal. 1987); *Pacific West Cable Co. v. City of Sacramento, Cal.*, 672 F.Supp. 1322 (E.D.Cal. 1987); *Preferred Communications, Inc. v. City of Los Angeles*, No. CV 83-5846 (CBM) (C.D.Cal. January 5, 1990) (on remand). If the view espoused by the lower courts in this case becomes predominant, *Preferred* and similar cases will be drained of all vitality and the important First Amendment responsibility to guard against excessive government control will be shifted from the courts to the government regulators themselves.

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[8] The district court avoided any consideration of less restrictive alternatives by holding, as a matter of law, that the city had no legal obligation to allow *any* modification of the city's utility poles to accommodate two cable systems. (Pet. App. 20a). It offered no citation of authority for this remarkable conclusion, which is markedly at odds with the Court's mandate in *Preferred* to "balance" the competing interests, including the impact on public facilities and rights-of-way.

II. THE COURTS BELOW WERE REQUIRED TO CONSIDER MADISON'S EVIDENCE IN DETERMINING THE LAWFULNESS OF THE CITY'S ACTIONS AND THE EXISTENCE OF DISPUTED ISSUES OF FACT

Although we believe that the decision below is wrong even if it were proper to decide the case on the basis of the "record" compiled by the city council itself, we believe that the courts were also mistaken in limiting their attention to that "record." The lower courts refused to consider the evidence offered by Madison that the rights-of-way in Morganton could accommodate more than one cable system, that competition in cable television is economically feasible in Morganton, that Madison's proposal was adequate to meet the needs and interests of the community, or that any of the other facts were different from those determined by the city. Madison sought to prove that at least one cable line could be added on the existing utility poles or placed underground in the rights-of-way. This self-evident fact is not subject to genuine dispute and has been admitted without challenge in cable television litigation in numerous cities where the rights-of-way are identical in physical capacity to those in Morganton. Nevertheless, Madison offered affidavits and sought discovery, which the district court summarily denied, to establish this critical fact. The district court stated:

> Because this Court has determined that the case should be decided on the basis of the record before the Council, the affidavits [offered by Madison] are irrelevant. (Pet. App. 19a-20a).

Such an exclusion of evidence is indefensible. As this Court's discussion in *Preferred* makes clear, courts may not simply assume that a law furthers the interests asserted by the government. *Preferred*, 476 U.S. at 496. In First Amendment jurisprudence, where the necessary facts are not obvious, and the plaintiff proffers relevant

evidence, the court has an obligation to adjudicate the resulting factual issues. This obligation is not eliminated merely because the legislature purports to make a factual finding based on a legislative record. *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *id.* at 844 ("Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.")[9]

As this Court's decision in *Landmark* observes, one of the reasons for adoption of the First Amendment was as a check on excessive government power—indeed, freedom of the press was seen as the most important check on government power. *See* Frederick Schauer, "Free Speech and Its Philosophical Roots," in *The First Amendment—The Legacy of George Mason* 132, 135 (T. Daniel Shumate ed., 1987); V. Blasi, "The Checking Value In First Amendment Theory," 1977 Am. B. Found. Res. J. 521,

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[9] Even in cases where government action is not subject to the heightened scrutiny required by the First Amendment, an aggrieved party is permitted to present evidence challenging the government action. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("parties challenging legislation . . . may introduce evidence supporting their claim that it is irrational . . .") (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938)). *See also Chastleton v. Sinclair*, 264 U.S. 543 (1924); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960); *Milnot Company v. Richardson*, 350 F. Supp. 221, 224 (S.D. Ill. 1972) ("While this court most certainly does not sit as a 'super legislature,' weighing the wisdom, need, or general appropriateness of legislative policy, it must consider the possible violation of due process of law in existing declared policy."); *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179 (1972) ("Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion . . . the issue raised becomes the subject of judicial inquiry as a question of fact.")

529-44 (1977). That critical function would be lost if the government retained the power to decide what could be published based on its determination of what is "fair" or "best." In this case it would be particularly egregious, since the decision-making body, a city council anxious for the additional revenue and control that would come from operating its own cable system, was not a disinterested, impartial tribunal, but was a self-interested participant.

The trial court was simply mistaken in its belief that it had to defer to the city council and could not properly consider Madison's evidence. The district court misconstrued decisions regarding the proper limits of judicial power in reviewing the actions of the executive and legislative branches of government. Confusing the admonition that the courts may not "second-guess" the judgment of the co-equal branches of government in the lawful exercise of their power with a rule of evidence and procedure, the district court created a rule that would bar evidence offered to prove that the other branch of government had exceeded its lawful power by violating the Constitution. As this Court concluded in *Landmark*, whatever harmful effects flow from allowing full judicial scrutiny of legislation affecting First Amendment rights are precisely the sort of dangers "envisioned by the Founders in presenting the First Amendment for ratification." *Landmark*, 435 U.S. at 845.

The district court's decision granting summary judgment for the city recites a large number of critical facts as reasons for the decision. Those findings were directly contradicted by the evidence offered by Madison. The district court resolved this conflict in the evidence by declaring Madison's evidence "irrelevant," "conclusory" or "improper" and adopting without further consideration the "findings" of the city council as its own. The district court overlooked the evidence favoring Madison that was in the "record" before the city council. Madi-

son's franchise proposal, its explanations, its customer surveys and opposing arguments were ignored in deference to the city council's contrary "findings." Madison's affidavits, and Madison's evidence contained in the city's "record," created a genuine dispute of fact on each of these topics.

"[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)). The district court examined the materials submitted by the city only to see "whether the evidence before the Council when it adopted the ordinance was adequate to support the decision." (Pet. App. 13a). Because the district court was operating with a fundamental misconception about the substantive legal standard to be used in scrutinizing the city's actions, it utterly failed in its responsibility to ascertain whether there were genuine issues of fact. The district court reasoned that there were no genuine issues because the evidence offered by Madison that was contrary to the city's findings was not "material." The court deemed Madison's evidence to be immaterial because it felt the court was duty-bound to accept the findings of the city council as a legislative body. This presumption in favor of the moving party is exactly the opposite of the one that should have been applied and warrants reversal of the decision.[10] The error here is of constitutional dimen-

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[10] Additionally, the *O'Brien* standard under the First Amendment places the burden of proof on the city, not on Madison, with respect to the justification for the city's action. Using that standard, the quantum of proof required to sustain the city's burden as the moving party is higher and would not be satisfied by the conflicting evidence in the city's record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Madison's other evidence directly controverting the city's claims eliminates all doubt that summary judgment was improper in this case.

sion because it resulted in sanctioning the destruction of a private media outlet and its replacement with a government surrogate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1500

MADISON CABLEVISION, INCORPORATED,
a Delaware Corporation,
Plaintiff-Appellant,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; COUNCIL MEMBERS ROBERT H. CHOATE; MOLLIE M. DARWIN; ALFRED W. HAMER, JR.; and DANNY H. LINGERFELT, in their official capacities,
Defendants-Appellees,

and

TELE-COMMUNICATIONS, INCORPORATED,
Defendant.

Appeal from the United States District Court
for the Western District of North Carolina, at Shelby
Woodrow Wilson Jones, Senior District Judge

(CA-86-5-SH-C)

Argued: March 8, 1991

Decided: November 22, 1991

Before WIDENER and SPROUSE, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Randall Maitland Roden, THARRINGTON, SMITH & HARGROVE, Raleigh, North Carolina, for Appellant. Joseph Leonard Van Eaton, SPIEGEL & MCDIARMID, Washington, D.C.; Thomas G. Smith, CREWS & HANCOCK, Fairfax, Virginia, for Appellees. ON BRIEF: Wade H. Hargrove, THARRINGTON, SMITH & HARGROVE, Raleigh, North Carolina, for Appellant. James N. Horwood, Donald Weightman, Lisa Gelb, SPIEGEL & MCDIARMID, Washington, D.C.; Steve B. Settlemyer, Morganton, North Carolina; W. Harold Mitchell, MITCHELL, BLACKWELL & MITCHELL, P.A., Valdese, North Carolina, for Appellees.

OPINION

PER CURIAM:

Madison Cablevision Inc. (Madison Cable) appeals from the district court's grant of summary judgment for defendants City of Morganton, and its mayor and city council and city manager, in this action. We refer to the defendants as the City. Madison Cable brought suit when its cable franchise expired and was not renewed by the City. It sought injunctive, declaratory, and monetary relief. The district court granted the City partial summary judgment, stayed further proceedings, and directed Madison Cable to institute a state court action with regard to certain state statutory and constitutional issues raised in Madison Cable's complaint. The North Carolina Supreme Court resolved the state law issues in favor of the City and that decision is reported as *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

Thereafter, the City moved for reconsideration of the district court's partial summary judgment order. On reconsideration, the district court granted the City summary judgment as to Madison Cable's remaining claims, and entered judgment dismissing the suit with prejudice. Madison Cable appeals.

We have considered the record and the briefs of the parties and have heard oral argument in this case. We are of opinion that Madison Cable's suit was properly dismissed and affirm the judgment of the district court for the reasons stated by the district court in its careful and thoughtful opinions and orders.

AFFIRMED

APPENDIX B

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC., a Delaware Corporation,
Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY H. LINGERFELT, in their official capacities,
Defendants.

JUDGMENT

[Filed May 14, 1990]

The issues arising in this cause have been determined by the Court as will appear in a Memorandum of Decision filed simultaneously herewith.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendants' motion for summary judgment be and the same is hereby allowed and the complaint is hereby dismissed with prejudice. The Plaintiff shall have and recover nothing of the Defendants and the Defendants shall recover their costs of the Plaintiff.

This the 11th day of May, 1990.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware Corporation,

Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY H. LINGERFELT, in their official capacities,

Defendants.

MEMORANDUM OF DECISION

[Filed May 14, 1990]

The Plaintiff, Madison Cablevision, Inc., a Delaware corporation, filed this action on January 6, 1986 seeking declaratory, injunctive and monetary relief against the Defendants, the City of Morganton, North Carolina, its Mayor and members of the City Council for alleged violation of its rights under various federal and state laws. The Defendants answered denying any violations of the Plaintiffs' rights under either federal or state laws and counterclaimed for damages for breach of contract, trespass and violations of state and federal antitrust laws.

The Defendants moved to dismiss the complaint under Rule 12(b)(1) and (6), Federal Rules of Civil Procedure and on April 4, 1986 moved for summary judgment under Rule 56, Federal Rules of Civil Procedure on the grounds that no genuine issue of material fact existed and they were entitled to a judgment of dismissal as a matter of law. In support of these motions the Defendants filed with the Court certain affidavits and copies of the proceedings had before the City Council relative to a franchise for a cable television system in the City of Morganton. The Plaintiff attached to its complaint a copy of the franchise agreement between the City and the Plaintiff and also filed some affidavits before the hearing. The Court heard arguments of counsel on the motions on May 16, 1986 and on July 9, 1986 entered its memorandum and order dismissing claims one and two set forth in the complaint. The Court declined to dismiss the other claims but abstained as to claim seven, which involved an allegation of violation of state monopoly and antitrust laws as set forth in North Carolina Constitution Art. 1, Sections 32 and 34 and North Carolina General Statutes Chap. 75, and claim eleven which involved an alleged violation of the public purpose requirement of the North Carolina Constitution pertaining to the validity of General Statutes 160A-311 and 312. The parties were directed to institute a state court action to obtain a decision on the validity of the state statutes and the constitutional provision. The state court action has been completed and the North Carolina Supreme Court has ruled in favor of the Defendants on these state issues. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

The Defendants have now moved for a reconsideration of the Court's order denying summary judgment on claims three through twelve. The Court heard arguments of counsel on the motion on April 9, 1990 and now enters its findings and conclusions.

In October 1966, the City of Morganton, through its City Council, adopted an ordinance granting Morganton TV Cable, Inc., a non-exclusive franchise to construct and operate a cable television system in the City for a period of twenty (20) years, the maximum period authorized by state law. Morganton TV, Inc. transferred its interest in the franchise to Suburban Cablevision, Inc., which thereafter transferred the interest to the Plaintiff, Madison Cablevision, Inc. Madison and its predecessors in interest have operated a cable television service in the City of Morganton continuously since October 1966 even though the franchise expired on October 25, 1986. The City owns the power poles to which the cables are attached and the rights of way on which the poles are erected.

The franchise provides no right of renewal and contains no provisions regarding procedures for any renewal. It does grant to the City an option to purchase the property of the franchisee at the expiration of the franchise or any renewal thereof. It further provides that upon termination of the franchise the franchisee shall remove its posts, poles and television transmission and distribution system from city property and rights of way.

In December 1983 Madison submitted a proposal to the City that certain improvements in its service would be made if the franchise was extended for five (5) years beyond the twenty (20) year term. That proposal was denied by the City. At about that time the City began to gather information concerning the future of cable television in Morganton. Rice Associates, an independent consulting firm from Washington, D. C. was hired by the City to assist in its study of cable television and its future for Morganton. Rice Associates made three studies and concluded that the system then existing in the City was inadequate; that the City needed a modern cable communications system, and that a city-owned and operated cable system was feasible.

On September 24, 1984, after viewing the Rice studies, the City issued a Request for Information (RFI) to the general public. Copies of the RFI were provided to Madison, Burke County Cable Co., Ltd. and Catawba Valley Communications, Inc. These were the only private cable television companies to have expressed any interest in providing cable television service for Morganton at that time. The RFI stated that a public hearing would be held on November 14, 1984 for the purposes of:

> (a) determining whether the franchise then held by Madison should be renewed;
>
> (b) determining whether other private cable companies were interested and capable of providing cable service in Morganton;
>
> (c) determining whether Morganton should establish a municipal cable system;
>
> (d) determining whether there was any interest in an overbuild of the cable system then existing in the City; and
>
> (e) determining whether more than one cable system in the City was practical.

Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. all responded to the RFI on October 26, 1984 and the public hearing was held on November 14, 1984 as planned. Representatives of each of the three cable television companies attended and participated in the council meeting. Madison's representative testified before the Council that the market in Morganton would support only one cable system. In addition to the representatives of the cable television companies, members of the general public, City employees, the President of Rice Associates and the manager of a municipally owned cable system in Shrewsbury, Massachusetts attended and testified at the hearing. Representatives of the three cable television companies were invited to not only testify but were also invited to ask questions of the other witnesses.

After considering the report of the various studies of Rice Associates, the advice of attorneys, the testimony and comments made during the public hearing, the City Council voted not to renew Madison's franchise, and not to grant a franchise to either Burke Cable Company, Ltd. or Catawba Valley Communications, Inc. Instead the City Council voted to proceed with a plan to construct and operate a municipally owned and operated cable television system. The Council did not foreclose the possibility that at some future date it might reconsider the question as to whether more than one cable system for the City would be in the public interest. Sometime thereafter Madison was advised to submit to the Council within ninety days (90) a plan for an orderly removal of its equipment from the city owned poles at the end of the franchise term as set forth in the franchise agreement.

Instead of submitting any plan for the removal of its equipment Madison brought this action seeking to prevent the City from requiring it to cease its cable operations in Morganton as provided under the franchise agreement. The complaint filed by Madison contains twelve claims for relief under both federal and state laws. The claims are as follows:

1. For a declaratory judgment that its request for franchise renewal is governed by Section 626 of the Cable Communications Policy Act of 1984, (Cable Act), 47 U.S.C.A. Section 546.

2. For judicial review of the City's decision not to renew its franchise pursuant to Sections 626 and 635 of the Cable Act, 47 U.S.C.A. Sections 546 and 555.

3. That the City violated Madison's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution.

4. That the City violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

5. That the City confiscated Madison's property without due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

6. That the City violated Section 2 of the Sherman Act, 15 U.S.C.A. Section 2.

7. That the City violated the North Carolina Monopoly and Antitrust laws, N. C. Constitution, Art. 1, Sections 32 and 34 and N. C. Gen. Stat., Chap. 75.

8. That the Defendants deprived Madison of its constitutional rights in violation of 42 U.S.C.A. Section 1983.

9. That the Defendants interfered with Madison's contractual rights and relations.

10. That the Defendants breached the contract between Madison and the City.

11. That the City violated the public purpose requirements of the North Carolina Constitution by entering the public television cable business, and

12. That the City's option to purchase the franchisee's cable system at the expiration of the franchise is an unconstitutional and unenforceable provision of the franchise agreement.

The Defendants contend that there exist no genuine issues of fact, that the actions of the City have been reasonable and lawful and that they are entitled to judgment as a matter of law dismissing all of the claims filed by the Plaintiff. On the other hand the Plaintiff contends that there are genuine issues of material fact which must be tried by a jury.

Madison attached to its complaint a copy of the franchise agreement and the Defendants filed with the Court a copy of the proceedings before the City Council. Both sides filed affidavits and from the pleadings together with the exhibits and affidavits the Court determined at the May 16, 1986 hearing that no genuine issues of material fact existed as to the first two claims and entered an order dismissing those claims.

In view of the serious legal question as to whether the City could enter the cable television business under the North Carolina Constitution the Court abstained from ruling on the other claims until the issues could be determined by the North Carolina Courts. The Court denied the Defendants' motion for summary judgment on the other claims but retained jurisdiction of the case until the Supreme Court of North Carolina could act upon the state claims.

In an unanimous opinion filed December 7, 1989 the Supreme Court ruled as follows:

> In summary, we hold that the provisions of General Statutes, Chapter 160A, Article 16, Part 1 which authorize cities to finance, acquire, construct, own and operate a cable television system, do not violate the public purpose clause of the North Carolina Constitution and that the City of Morganton's refusal to grant cable television franchises to private applicants, including plaintiff, and its decision to build and operate a municipal cable system do not violate the exclusive emoluments and monopoly clauses of Article I, Sections 32 and 34 of our Constitution or the antimonopoly, or the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes. We further hold that the trial judge did not err in allowing summary judgment for the defendant city and in denying summary judgment for the plaintiff Madison Cablevision, Inc.

The Defendants then filed a motion in this Court for a reconsideration of the denial of their motion on claims three through twelve in light of the decision of the North Carolina Court. The Court scheduled a hearing on this motion and heard arguments of counsel in Rutherfordton, North Carolina on April 9, 1990 and allowed counsel ten days after the hearing to file any additional briefs or other matters.

The Court after a careful reexamination of the pleadings, briefs, documents, affidavits and arguments now enters its findings and conclusions.

The Court re-affirms its order dismissing claims one and two of the complaint for the reasons set forth in the memorandum and order dated July 3, 1986 and filed July 9, 1986. It is established by the record before the Court that there were less than 30 months remaining on Madison's franchise as of the effective date of the Cable Act and because the City began renewal proceedings prior to the date of its enactment, the Court concluded that as a matter of law the City was not required to conduct renewal proceedings in accordance with the Cable Act and that Madison is not entitled to the protection afforded existing franchisees under those renewal provisions. Madison's Cable Act claims were therefore dismissed.

The first question for the determination of the Court is whether the Defendants' motion for reconsideration by the Court of its order denying the motion for summary judgment on the remaining claims three through twelve in view of the decision of the North Carolina Supreme Court referred to above. Without a doubt the decision of the State Supreme Court resolving the most difficult claims alleged under state law places an entirely different light on the issues arising in this cause. The Court feels compelled now to grant the motion for reconsideration of its previous order and will proceed to determine whether summary judgment should be allowed as to the remaining claims advanced by Madison.

In considering a motion for summary judgment, the moving party has the burden of proof and the Court must assess the evidence in the light most favorable to the party opposing summary judgment. However, where a party has submitted a summary judgment motion with a sufficient evidentiary forecast, the party opposing the motion must respond with specific facts showing the existence of a genuine issue for trial. Conclusory allegations or legal conclusions will not serve to establish the existence of a genuine issue of material fact.

An examination of Madison's contentions shows that many of the issues involve only questions of law. Other "factual issues" rest on purely conclusory allegations. Madison's factual allegations about the Defendants' motives and intentions are irrelevant, and hence fail to raise issue of material fact.

Madison has submitted affidavits challenging the factual basis for the Council's decisions. It appears that it is contending that each factual finding made by the Council should be retried by a jury. However, the issue before the Court is not whether the Council made the right decision, but whether the evidence before the Council when it adopted the ordinance was adequate to support the decision. It must be remembered that the City Council of Morganton is a legislative body.

In *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986), where there was a similar First Amendment challenge to the factual support of a city ordinance, the Court held:

> To have [a legislative] determination sustained against constitutional attack, a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results. *Judicial review goes only to whether the legislative determination of justification and fitness is not*

facially without factual support, hence not arbitrary and capricious. (emphasis added)

See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 930-31 (1986), (city could rely on factual studies made by other cities). In the case of *Major Media of Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1451-52 (E.D.N.C. 1985), the validity of and factual support for a billboard ordinance were challenged on First Amendment grounds, and the Court found that a lack of empirical studies and other evidence about traffic problems addressed in the ordinance did not create a factual issue for trial, and summary judgment in favor of the city was appropriate. *See also Town of Narrows v. Clear-View Cable TV, Inc.*, 315 S.E.2d 835 (Va), *cert. denied and appeal dismissed*, 105 S.Ct. 315 (1984). The Court held in this case that evidence proffered to Court cannot justify finding that City action was arbitrary, where evidence before the City Council supported the decision to revoke a cable franchise.

In the case at bar the Court finds that the record produced by Morganton supports the ordinance in question. The opportunity given to Madison to make its contentions and to present its evidence at the hearing before the City Council also lends support to this conclusion.

This conclusion is reinforced by the evidence offered by Madison at the hearing. Madison took the position at the hearing that only one cable company could survive in Morganton and that overbuilding the system there was impractical. The City's decision, rests in part upon Madison's representations in writing and the spoken word. The authority and ability to conduct a rational franchising process depends on local government's ability to develop and rely upon a record. To allow a franchisee to challenge the franchising process in Court on the basis of information which is contrary to information given earlier or which could have been presented, but was not, undermines cable regulation. Madison cannot now be

heard to complain that the City's decision to limit cable franchising in Morganton to one operator is factually without support when the Council's decision is supported by Madison's own factual representations before the Council at the hearing.

Giving the presentations of the parties all the weight to which they are entitled, the Defendants have met their burden under Rule 56, Federal Rules of Cicil Procedure. Madison has not responded with material sufficient to show there is a genuine issue for trial. For these reasons, resolving the remaining claims on Rule 12(b)(6) dismissal and summary judgment is appropriate without further discovery.

FIRST AMENDMENT, FREE SPEECH, AND CONSTITUTIONAL CONDITIONS

The third and twelfth claims for relief allege that the ordinance in question violates freedom of speech provisions of the federal and state constitutions. Madison contends that the City violated its First Amendment rights by failing to renew its franchise when it expired and by deciding that the City would construct and operate a government owned and operated cable television system. The effect of this contention is that Madison is entitled under the First Amendment to continue to operate its cable television system in the City of Morganton even though its twenty-year franchise has expired and it is entitled to continue to use the city owned poles and rights of way on a permanent or indefinite basis. Madison also contends that cable operations must be equated to newspaper publishing. These contentions stretch the First Amendment far beyond which any court has gone thus far.

The Court agrees with the reasoning of those courts which have determined that communities have a right to regulate cable to insure that optimum use is made of the public rights of way. *Omega Satellite Products Co.*

v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). Particularly when, as in this case, there are limitations on the number of those claiming the right to communicate who can be accommodated, there is no absolute First Amendment right to communicate. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 89 S.Ct. 1794 (1969). Madison also contends that cable operations must be equated to newspaper publishing. The law is that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386.

The complaint does not allege nor was there any evidence before the City Council to even suggest that the City sought to remove Madison because of the content or viewpoint of its cable television programming past, present or prospective. Accordingly, the City's legislative decicions not to franchise more than one cable operator and not to renew Madison's franchise, should be resolved under the test in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Both the decision not to renew Madison's franchise and the decision to grant a single franchise relate to the City's control over public property. Control over its property is within the constitutional powers of a local government. *Adderley v. Florida*, 385 U.S. 39, 47; 87 S.Ct. 242 (1966).

The decision not to renew Madison's franchise furthers the following substantial government interest: the City's authority or duty in granting any franchise to enforce contracts and impose public service obligations on the franchisee, see *Shaw v. Asheville*, 269 N.C. 90 (1967); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 677-78 (1918); the City's interest in preventing the dangers flowing from unregulated monopoly control over a scarce resource; and the City's interest in obtaining a system with enough channel capacity to provide and promote access to ensure diversity of speech and information services, see 47 U.S.C.A. Section 521(4).

The City Council found in the record from the evidence before it that Madison's past and proposed system would not serve these interests. Specifically, the Council found that Madison had not been candid in its representations to the City. This is directly related to whether Madison, as a potential future franchisee, would honor its public service obligations during any further franchise. This finding is supported by the fact that Madison denied that it had ever had a franchise revoked when in fact its franchise in Richland County, South Carolina had been revoked. The Council further found that its ability to obtain a modern communication system meeting community needs would not be served by renewing Madison's franchise, and that Madison's proposal would offer little opportunity for access, and related capacity to enhance the diversity of communications in the City. These findings are supported by the evidence before the Council including the findings and recommendations made by a cable consultant. The decision by the Council not to renew Madison's franchise was supported by the record.

The record before the Court discloses that the Council's decision to grant a single franchise furthers the following substantial government interests: prevention of disruption in city streets and rights of way, see *Community Communications Co. v. City of Boulder*, 660 F.2d 1370,

1377-78 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982); conservation of the space on city utility poles, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065 (1984); and ensuring that public rights of way are optimally used, in a manner that serves the public interest.

The Council's decision directly relates the evidence before it to these interests. The Council found that "overbuilding will require significant replacement of city property and may result in disruption of other city services." The Council stated that it wished to conserve relevant resources and protect against safety and other problems which might arise in the future. The Council further found that overbuilding, as an economic matter, would create long-term problems with little benefit to the City and its citizens.

Finally, the non-renewal of Madison's franchise and the grant of only one franchise, by providing for access and similar channels of communications, while avoiding the harms of multiple systems and inadequate service, meet the final part of the *O'Brien* test. The Council's findings show that the City's interests would not be furthered by granting a franchise to Madison; they also show that the City would be more exposed to harm if there were multiple systems than with one system. This is enough. *Clark*, *supra*, 104 S.Ct. at 3071 and n.8.

The Council's decision not to franchise more than one cable operator clearly passes muster under *O'Brien* in light of the evidence before it, including the evidence offered by Madison. In response to the question in the Request for Information concerning the advantages and disadvantages of having more than one cable operator in Morganton Madison stated:

> (1) Very few cities can support more than one company . . . to grant more than one franchise ultimately may cause all but one to fail. . .

(2) If more than one company does survive . . . prices may have to go higher. . .

(3) . . . built-in inefficiencies exist in dual management costs [etc.], which will be paid for by the community.

(4) . . . service disruptions are likely to occur to existing cable subscribers. . .

(5) . . . additional companies means more unsightly cables on the poles. . .

(6) . . . the present facilities would require massive make-ready and pole replacements.

(7) We estimate that 90% of the poles would require extensive make-ready and over one-half of the poles would have to be replaced.

In addition, Madison submitted supplemental information stating that permitting an overbuild "could leave the City with a mess on their hands." Burke told the Council that the cost of make-ready and pole replacement to allow a second operator to provide service in Morganton, would be in excess of $500,000.00, and Catawba Cable told the Council that the costs would be astronomical. There was also evidence showing that overbuilding had led to safety problems in Granite Falls and nearby Drexel. Finally, Burke told the Council that two companies could not survive indefinitely, and that overbuilding would likely have a deleterious effect on service.

The Court notes further that evidence showing a substantial number of existing poles would have to be replaced is not contradicted by Madison's affidavits in opposition to the summary judgment motion.

Madison challenged these findings by submitting affidavits stating that, while there is not room for two systems on the utility poles now, the poles could easily be altered or replaced to accommodate additional systems. Because this Court has determined that the case should

be decided on the basis of the record before the Council, the affidavits are irrelevant. Madison contends that it is proper to permit introduction of additional information because in its opinion the Council did not conduct a full investigation into overbuilding. The record shows the Council asked for detailed information concerning overbuilding, including the "extent and nature" of the work that would be required to permit overbuilding. As found by the Court in another section of this opinion, *de novo* review is contrary to the Fourth Circuit's decision in *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986). The City is not required to endure the harms it foresees from multiple systems because of Madison's First Amendment claims. *Wall Distributors, supra.* Therefore, the decisions challenged here not to renew Madison's franchise and not to grant multiple franchises satisfy the *O'Brien* standard as a matter of law.

Assuming *arguendo* that Madison's affidavits were relevant, they would fail to raise an issue of material fact requiring a trial. Accepting the allegations in the affidavits as true, the Court finds that it is evident that a substantial number of poles would have to be altered or replaced. The issue then would be whether Madison can demand that the City replace or renovate its utility poles so that a second cable operator can be accommodated in the future. This dispute is not a factual issue, but a legal question, and can be resolved on summary judgment, and must be resolved against Madison.

In any event, Madison has not challenged the evidence presented to the Council showing that the economic characteristics of cable in Morganton are such that granting two franchises would result in waste, deterioration of service and other harms; given cable's use of public property, the City's regulation of cable to avoid these harms is justified. See *Omega, supra*, 694 F.2d at 127-128.

In view of the fact that North Carolina courts follow the *O'Brien* test, see *County of Cumberland v. Eastern Federal Corp.*, 48 N.C.App. 518, 269 S.E.2d 672 (1980), the Court's analysis above of *O'Brien* means that Madison's free speech claims under the North Carolina Constitution must be dismissed.

Madison relies upon *City of Los Angeles v. Preferred*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), for support of its claims and for a denial of the motion for summary judgment. Madison also cites and relies upon *TCI of Key West v. United States*, 757 F.2d 1330 (D.C. Cir. 1985). In both *Preferred* and *Key West*, the First Amendment issues were considered under Rule 12 (b)(6). This Court is not restricted in its inquiry to the allegations in the complaint, as were the courts in *Key West* and *Preferred*, because the sufficiency of the claims are raised by summary judgment rather than on a motion to dismiss. The undisputed facts before the Court supply the information to this Court that was missing in these two cases.

In contrast to the situation in *Preferred*, here the City Council had a record before it from which it specifically found that economic and other harms will follow if there is more than one cable system in the City. And, again in contrast to *Preferred*, here the City Council found from the evidence including the statement of Madison, that there is not enough room on utility poles for more than one system, and in contrast to *Preferred* and *Key West*, here the decision was supported by evidence that Madison's proposal did not meet the community needs.

Madison's federal and state freedom of speech claims must be dismissed. The considerations which make the decision not to renew Madison's franchise reasonable also justify repurchase and other limitations on Madison's expired franchise. Those limitations do not constitute unconstitutional conditions and the twelfth claim must also be dismissed.

The ordinance on its face passes muster under the First Amendment. Madison offered affidavits in an attempt to show that City Council members acted with invidious motives, not appearing on the face of the ordinance on the record of the hearing before the Council. However, it has long been settled that it is not appropriate for courts to decide constitutional questions by engaging in a factual inquiry into legislative motives. *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550 (1949). This rules applies in First Amendment cases. *United States v. O'Brien*, 391 U.S. 367, 385, 88 S.Ct. 1673 (1968); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 930-31 (1986); *Wall Dist., supra.* Hence, the affidavits offered by Madison do not raise material issues of fact and the third and twelfth claims must be dismissed by way of summary judgment.

EQUAL PROTECTION

Madison raises in its fourth claim a series of equal protection issues. Because Morganton did not attempt to regulate the content of cable messages, and because the interests and concerns which make the City's action reasonable under the First Amendment also satisfy the standard of the Equal Protection Clause, the equal protection claims must also be dismissed. *City of Renton, supra; Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 831 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

Summary judgment is justified on each of the particular issues raised by Madison. Rate regulation is justified by the natural monopoly characteristics of cable identified above. Service requirements and fees may be imposed on the grantee of a franchise without violating the Equal Protection Clause. *Charlotte, Columbia and Augusta R.R. v. Gibbes*, 142 U.S. 386, 394-95, 12 S.Ct. 255 (1892). The repurchase option in Madison's franchise, whether or not exercised does not violate the Equal Protection Clause. *City and County of Denver v. New York Trust Co.*, 229

U.S. 123, 142-43, 33 S.Ct. 657 (1913). The City could regulate Madison's rates without similar rate regulation of its own rates. *Springfield Gas & Electric Co. v. City of Springfield*, 257 U.S. 66, 69, 42 S.Ct. 24 (1921). The City could impose a tax on Madison's operations without taxing its own enterprise. *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 624, 54 S. Ct. 542 (1934). *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 377, 94 S.Ct. 2291 (1974).

Madison contends that summary judgment is inappropriate because there are disputed issues of fact concerning the reasonableness of Morganton's legislative decisions and classifications. However, there was evidence before the City Council to support the decision it made. The Supreme Court stated in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715 (1981) that

> Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

Therefore, the Court holds that the equal protection claims are appropriately decided against Madison on summary judgment.

ANTITRUST CLAIMS

In its sixth and seventh claims, Madison alleges that various acts of the Defendants, allegedly made with the specific intent and inevitable effect of monopolizing the cable television market in Morganton, violate Section 2 of the Sherman Act, 15 U.S.C.A. Section 2 and Article I, Sections 32 and 34 of the North Carolina Constitution and of Chapter 75 of the North Carolina General Statutes.

The decision of the North Carolina Supreme Court on December 7, 1989 in *Madison Cablevision v. City of Morganton* laid to rest the claims presented in Madison's

seventh claim. The Court held that the state statute which authorized Morganton to finance, acquire, construct, own and operate a cable television system does not violate the public purpose clause of the North Carolina Constitution and that the City's refusal to grant cable television franchises to private applicants, including the Plaintiff and its decision to build and operate a municipal cable system do not violate Sections 32 and 34 of the North Carolina Constitution or the antimonopoly or the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes. This Court adopts the holding of the North Carolina Supreme Court and will grant summary judgment in favor of the City on the claims set forth in the seventh claim.

Short shrift can be made with the sixth claim. Even viewing the facts in the light most favorable to Madison, it is clear that Morganton and its agents are immune from antitrust liability because state law authorizes the Defendants' conduct in all respects, thus exempting them from antitrust liability under the "state action" doctrine. *Town of Hallie v. City of Eau Claire*, 477 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985).

These claims will be dismissed by way of summary judgment as the City is entitled to a dismissal as a matter of law.

BREACH OF CONTRACT

In its tenth claim for relief, Madison alleges that the City's failure to renew its franchise constitutes a breach of contract. As Madison itself concedes, the contract grants no right to renewal and sets forth no procedure for renewal. In fact, the contract, clearly states that the franchisee shall remove its equipment from the city property at the end of the twenty-year franchise term. Apparently, Madison is alleging an obligation on the part of the City to renew the contract which arises by implication. In paragraph 76 of the complaint Madison alleges:

> The franchise contains no specific provision regarding procedures and standards to be followed for renewal of the franchise. Nevertheless, the contractual relation and the course of dealing between the parties establish upon the City an obligation of good faith and fair dealing.

In support of this contention Madison has offered the affidavit of Terrel E. Davis which sets forth in general terms that Madison had a "reasonable expectation of renewal based on its continuing communication with the City regarding renewal of its franchise." Mr. Davis then observes that the omission of a renewal provision from the franchise is "not unusual," and that the "vast majority of franchises lacking such provisions are extended or renewed pursuant to good faith negotiations between the parties." No documentation is provided in support of these assertions and conclusions. These unsupported and conclusory assertions or observations merely repeat the conclusory allegations of the complaint and are legally insufficient to establish the claim. There is evidence in the record that the City refused Madison's request in 1983 to grant a five-year extension in exchange for certain improvements in service. Douglas O. Bean testified by way of affidavit that in 1984 Madison was sent a letter advising that renewal was not guaranteed. Other affidavits indicate that much of the negotiations between the City and Madison revolved around the purchase by the City of Madison's equipment. So the evidence in the record does not support Madison's claim that it had a "reasonable expectation of renewal."

But assuming *arguendo* that what Mr. Davis concludes is true, the claim must fail. The materiality of Madison's asserted factual issue is necessarily dependent upon application of traditional rules of contract construction to the franchise at issue. The results claimed by Madison are contrary to the relevant authorities.

Under North Carolina law, the grant of a franchise to operate a cable television system is a special kind of right

not held by all persons in common. *Kornegay v. City of Raleigh*, 269 N.C. 155, 152 S.E.2d 186 (1967). Because of the governmental nature of the grant, the general rule is of strict construction against the franchise holder and in favor of the municipality. *Hill v. Elizabeth City*, 291 Fed.Rep. 194 (E.D.N.C. 1923), *affirmed*, 298 Fed. 67 (4th Cir. 1924); *see also Stillings v. City of Winston Salem*, 311 N.C. 689, 697, 319 S.E.2d 233 (1984). All rights asserted against the municipality must be clearly defined and not dependent on inference or presumption. *Hill, supra;* 12 McQuillin, Municipal Corporations, § 34.16a (3rd.Ed. 1970). Where a city has not by contract or otherwise restricted the exercise of its public powers, it is not to be shorn of its powers by "mere implication." *Water Co. v. Knoxville*, 200 U.S. 22, 23, 26 S.Ct. 224 (1906). Under this standard, Madison's claims that the "course of dealing" and "typical industry practice" gave rise to an implied right of renewal fails as a matter of law. The Court may not supply a renewal term to the franchise by "mere implication," as contended by Madison. *Water Co. v. Knoxville, supra.* 200 U.S. at 23.

In support of its breach of contract theory Madison asserts in conclusory fashion that the City's decision not to renew the franchise was arbitrary and capricious, and made in bad faith. These asserts are not sufficient to state a claim as a matter of law. The power of a municipality to grant, deny or renew franchises to public enterprises, including cable systems, is essentially legislative and discretionary. *Cablevision of Winston Salem v. Winston Salem*, 3 N.C.App. 252, 260, 164 S.E.2d 737, 742 (1968). Courts may not interfere with the exercise of legislative powers in the absence of a gross, oppressive, or manifest abuse of authority, or disregard of the law. *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 151 S.E. 2d 5 (1966). Madison has made no factual allegation or offered proof of any material supporting the conclusory

allegations of "arbitrary and capricious" conduct or any lack of "good faith and fair dealing" on the part of the City Council.

But assuming *arguendo* that Madison's allegations state a claim, the ordinance, the Council's decision, and the record before the City Council demonstrate that the renewal decision was not arbitrary and capricious or tainted by bad faith and unfair dealings as those terms are defined by the North Carolina courts. *See In re Housing Authority of City of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). It is shown by the record that Madison was given four opportunities to present its position to the City Council. These four occasions were (1) in its response to the "Request For Information," (2) through supplemental written information before the public hearing began; (3) through oral and written presentation at the public hearing with the right to testify, offer witnesses and to examine other witnesses; and (4) in its submission of further written material within 30 days after the public hearing. The record shows that the Council members heard and considered all the evidence presented and made their decision, and it appears that the decision was a reasonable one based upon the evidence. Thereafter, Madison's breach of contract claim fails.

TORTIOUS INTERFERENCE

Madison's ninth claim for relief, tortious interference with contract, fails to state a claim for the same reasons set forth under its breach of contract claim. Madison contends in its brief that the crucial issue with regard to its claim for tortious interference is whether the Defendants' actions are legally justified.

The facts necessary to resolve this claim are not in dispute. The franchise expired by its terms in October 1986, and as a matter of law, denial of renewal does not "interfere" with the contract relations between the City

and Madison under the expired franchise. Nor can Madison claim that there has been tortious interference with its relations and contracts with its subscribers by virtue of the City's refusal to renew the franchise. Nothing in the cable ordinance on its face either terminates or interferes with Madison's present relationship with its subscribers in contravention of rights under the expired franchise.

Madison could claim a "prospective advantageous relationship" sufficient to support such allegation only if it had a statutory or contract right to renewal of the franchise. Madison has neither right of renewal. It can enter into valid contracts with subscribers only to the extent it has authority to operate a cable franchise. As a matter of law the City does not tortiously interfere with those rights when it exercises its legal right to let the franchise expire. *See Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945).

DUE PROCESS

In its fifth and tenth claims for relief Madison alleges that the City's actions will deprive it of its property, either directly through failure to renew the franchise (fifth claim) or indirectly through the City's proposed action in providing cable services itself (tenth claim). It contends that the property right at issue in these claims is its franchise to operate a cable television system in the City of Morganton.

As a general matter, a franchisee's property rights are not violated when a company whose franchise has expired is replaced by a publicly owned system. *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 142, 33 S.Ct. 657 (1913); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 577, 24 S.Ct. 553 (1904). Moreover, the holder of an expired franchise has no greater right than the holder of an unexpired franchise. The rule with regard to revocation or annulment of an exist-

ing franchise is simply that the franchise is a property right which may not be terminated without due process. *Boyce v. City of Gastonia*, 227 N.C. 139, 41 S.E.2d 355, 359 (1947).

The Court has outlined above the procedure taken by the City Council to determine whether the franchise would be renewed and determined that its action was not arbitrary or capricious. Madison was afforded all the due process due it under federal and state law and the Constitutions.

Madison's contention that an indirect "taking" will result from the effect of City's "competition" with its franchise is without merit. Madison's reliance upon the case of *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 19 S.Ct. 77 (1898) in support of its contention that a "taking" results from the action of a municipality in competing with its franchisee is misplaced. The franchise at issue in *Walla Walla* was in effect during the time of the City's action and specifically prohibited the City from establishing its own water system, except upon the failure of the water company to adequately serve the public under its franchise. At the time the City proposed to establish its own water system, this contractual condition had not been satisfied. In contrast, Madison's franchise expired and the City has not yet built its cable system because of this litigation, and the franchise in the case at bar contains no provision preventing Morganton from competing with Madison.

The North Carolina Supreme Court in *Stillings v. City of Winston Salem, supra*, (1984) held that a commercial service franchise does not provide protection to the holder against government service which would compete with it, notwithstanding that the value of the franchise is diminished or destroyed by such competition. *See also Bridge Co. v. United States*, 105 U.S. 470 (1882), and *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S.

354, 22 S.Ct. 400 (1902). Accordingly, Madison has no property right, or the expectation of a renewed property right, which would be "taken" by the action of the City Council of Morganton in voting to provide cable service to its citizens.

Madison's contention that expenditures made to upgrade its cable system based on its unilateral expectation of extension of its franchise create property rights entitled to protection is without merit. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446 (1980). Even if all the facts alleged by Madison were true it has alleged nothing which would make its investment of money reasonable in light of the impending expiration of its franchise. To the contrary the record before the Court indicates without question that it was unreasonable as a matter of law for Madison to upgrade its system on the basis of an unilateral expectation of renewal. Expenditures based on unilateral expectations do not create property rights. *Bridge Co. v. United States, supra.*

The Court concludes that Madison has lost no property interest protected by state law and therefore its constitutional claims alleging deprivation of property without due process are without merit. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). If the City elects to insist upon enforcing the provision of the franchise giving it the option to purchase Madison's equipment the parties would have to agree upon the value or a court of competent jurisdiction would determine such issue.

CIVIL RIGHTS

Madison set forth in its eighth claim that Defendants have violated its civil rights under 42 U.S.C.A. Section 1983. The individual Defendants who are Council members and Mayor of the City of Morganton would be im-

mune from suit for their legislative acts under Section 1983, but they are not sued in their individual capacity. The Court has determined that the Defendants are entitled to judgment in their favor on all the claims advanced by Madison. Therefore, the eighth claim states no claim for relief itself. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618, 99 S.Ct. 1905 (1979). *Pleasant View Elementary School PTA v. Group 1 Defendants*, 763 F.2d 652, 655 (4th Cir. 1985).

Madison's eleventh claim is that the City violated the public purpose requirements of the North Carolina Constitution by entering the public cable television business. As set forth above the North Carolina Supreme Court ruled against Madison on this issue and this Court adopts the ruling and will therefore dismiss the claim.

At the hearing on April 9, 1990 Madison moved to amend the complaint by striking claims seven and eleven and adding a new claim. Since the Court and counsel for the Defendants had not seen the proposed amendment, the Court delayed ruling on the motion. It appears that Madison desires to file an amended complaint consisting of twenty-five pages, with ninety-four numbered paragraphs and two and one-half pages of "prayer for relief." The Court will deny the motion to amend for the following reasons: (1) the proposed amended complaint does not conform to Rule 8(a)(2), Federal Rules of Civil Procedure which requires a "short and plain statement of the claims . . .;" (2) this litigation was instituted on January 6, 1986 and Madison has continued to operate its cable system in Morganton since its franchise expired on October 25, 1986 and further delay should not be permitted. Madison had from December 7, 1989, when the Supreme Court decision was rendered until April 9, 1990 to move for amendment but waited until the day of the hearing to offer the amended complaint.

The Court is aware of and follows the rule that amendments should be freely allowed but in the interest of

fairness and justice the Court will exercise its discretion and deny the motion to file an amended complaint at this late date.

The Court finds and concludes that there is no genuine issue of any material fact and the Defendants are entitled to a judgment of dismissal of all the claims set forth in the complaint as a matter of law. A judgment of dismissal of all the claims will be entered simultaneously herewith.

This the 11th day of May, 1990.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware corporation,

Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY LINGERFELT, in their official capacities,

Defendants.

MEMORANDUM AND ORDER

[Filed Jul. 9, 1986]

Plaintiff brought this action seeking declaratory, injunctive, and monetary relief against Defendants for alleged violation of its rights under federal and state law. The Plaintiff presently owns and operates cable television systems in Morganton, Valdese, and portions of Burke County, North Carolina. The Defendants are the City of Morganton, its mayor and city manager and the elected members of its city council. The matter is before the Court upon Defendants' motions to dismiss and for summary judgment. The Court heard the motions in Ashe-

ville, North Carolina on May 16, 1986. After careful consideration of the record, briefs and arguments of counsel the Court now enters its findings and conclusions.

In October 1966 the City of Morganton, North Carolina (Morganton or City), through its city council, adopted an ordinance granting Morganton TV Cable, Inc. a non-exclusive franchise to construct and operate a cable television system in Morganton. The franchise was for a period of twenty years. Morganton TV Cable, Inc. subsequently transferred its interest in the franchise to Suburban Cablevision, Inc., which thereafter transferred its interest to Madison Cablevision, Inc. (Madison), the Plaintiff herein. The assignment and transfer of the franchise to Madison was approved by resolution of the City dated July 29, 1974. Madison has operated a cable television service in Morganton at all times since December 1974. By the terms of the franchise it is due to expire, if not renewed, on or about October 25, 1986.

The franchise provides no right to renewal and contains no provisions regarding procedures for renewal. It does grant the City an option to purchase the property of the franchisee at the expiration of the franchise or any renewal thereof. It further provides that upon termination of the franchise the franchisee shall remove its posts, poles and television transmission and distribution system from City property and rights of way.

In December 1983 Madison submitted a proposal to the City for renewal of its franchise. That proposal was denied. At about the same time the City began to gather information concerning the future of cable television in Morganton. Rice Associates, an independent consulting firm from Washington, D.C., and Spiegel & McDiarmid, a Washington, D.C. law firm, were hired by the City to assist in its study of cable television for Morganton. Rice Associates made three studies which concluded that the system then existing in the City was inadequate; that the City needed a modern cable communications system;

and that a City-owned and operated cable system was feasible.

On September 24, 1984, after reviewing the Rice studies, Morganton issued a Request for Information (RFI) to the general public. Copies of the RFI were provided to Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. Those were the only private cable companies to have expressed any interest in providing cable television service for Morganton at that time. The RFI stated that a public hearing would be held on November 14, 1984 for the purposes of:

> (a) determining whether the franchise then held by Madison should be renewed;
>
> (b) determining whether other private cable companies were interested and capable of providing cable service in Morganton;
>
> (c) determining whether Morganton should establish a municipal cable system;
>
> (d) determining whether there was any interest in an overbuild of the cable system then existing in the City; and,
>
> (e) determining whether more than one cable system in the City was practical.

Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. all responded to the RFI on October 26, 1984. The public hearing was held on November 14, 1984 as planned.

At the hearing representatives of each of the three cable television companies, as well as members of the general public, were given the opportunity to make comments. City employees, the president of Rice Associates, and the manager of a municipally owned cable system in Shrewsbury, Massachusetts also spoke at the hearing.

After considering the reports of the various studies performed by Rice Associates and Spiegel and McDiar-

mid and the comments made during the public hearing, the city council decided not to renew Madison's franchise, not to award a franchise to either Burke Cable Co., Ltd. or Catawba Valley Communications, Inc. and to proceed with the construction of a municipally owned and operated cable television system. The city council did not foreclose the possibility that at some future date it might reconsider whether more than one cable system for the City was in the public interest. By ordinance dated September 9, 1985 Madison was given 90 days to submit a plan to the City for orderly removal of its equipment from City poles at the end of the franchise term.

Madison brought this action seeking to prevent the City from requiring it to cease its cable operations in Morganton. Its complaint is comprised of 12 claims for relief under both federal and state law. The first claim for relief is for a declaratory judgment that its request for franchise renewal is governed by Section 626 of the Cable Communications Policy Act of 1984, (Cable Act), 47 U.S.C.A. § 546. Its second claim for relief is for judicial review of the City's decision not to renew its franchise pursuant to Sections 626 and 635 of the Cable Act (47 U.S.C.A. §§ 546 and 555). In its third claim for relief Madison alleges violation of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution. In its fourth claim for relief Madison alleges violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Its fifth claim for relief alleges confiscation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The sixth and seventh claims for relief allege respectively attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2, and violation of North Carolina monopoly and antitrust laws, N.C. Const. Art. 1, §§ 32 and 34 and N.C.Gen.Stat., Chap. 75.

The eighth claim for relief alleges deprivation of Madison's constitutional rights in violation of 42 U.S.C.A. § 1983. In its ninth and tenth claims for relief Madison alleges common law claims of interference with contractual relations and breach of contract. The eleventh claim for relief alleges violation of the public purpose requirement of the North Carolina Constitution, Article V, Section 2(1). In its twelfth claim for relief Madison alleges that the City's option to purchase the franchisee's cable system at the expiration of the franchise is an unconstitutional, and therefore unenforceable, provision of the franchise agreement.

The Defendants contend that there exist no genuine issues of material fact, that the actions taken by the City have been reasonable and lawful, and that they are entitled to judgment as a matter of law dismissing the Plaintiff's complaint. Plaintiff contends that there are genuine issues of material fact which must be tried by a jury.

The Court first considers the applicability of the franchise renewal provisions of the Cable Act in this case. The Cable Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984), was enacted for several purposes, including establishment of a national policy concerning cable communications, promotion of competition in cable communications and protection of cable operators against unfair denials of franchise renewal. 47 U.S.C.A. § 521. The act became effective December 29, 1984. Pub. L. No. 98-549 § 9(a), 98 Stat. 2779 at 2806 (1984).

Madison contends that it is entitled to the franchise renewal protections afforded by the Cable Act, 47 U.S.C.A. § 546. These protections include, *inter alia*, the right to a public hearing, the right to introduce evidence and question witnesses at such hearing and the right to franchise renewal absent one or more specified adverse findings which must be supported by a preponderance of

the evidence. The franchise renewal provisions of 47 U.S.C.A. § 546 are optional, except that upon request of the franchisee the renewal provisions are mandatory. The time for beginning franchise renewal proceedings is the 36th to 30th month before franchise expiration. 47 U.S.C.A. § 546(a). By implication at least, where a cable operator fails to request renewal proceedings in accordance with the Cable Act prior to the 30th month before franchise expiration it waives its right to such proceedings.

Madison's franchise expires in October 1986, some 22 months after the December 1984 effective date of the Cable Act. As of December 1984, there was insufficient time to conduct franchise renewal proceedings pursuant to the timetable of 47 U.S.C.A. § 546. Congress provided for no transitional renewal provisions for those franchises which were already within 30 months of expiration as of the effective date of the Act. Failure to provide for such situations was not simply an oversight. The legislative history of the Cable Act shows that the House Committee was aware that the Act contained no transitional renewal provision. H.Rep. No. 934, 98th Cong., 2d Sess. at 72 (1984). The legislative history further shows that the renewal provisions were not meant to apply retroactively where a franchise due for renewal less than 30 months after passage of the Act was already subject to renewal proceedings prior to enactment. *Id.*

Because there were less than 30 months remaining on Madison's franchise as of the effective date of the Cable Act, and because the City had begun renewal proceedings prior to the date of its enactment, the Court concludes that the City is not required to conduct renewal proceedings in accordance with the Cable Act and that Madison is not entitled to the protection afforded existing franchisees under those renewal provisions. Madison's Cable Act claims must therefore be dismissed.

Having determined that the renewal provisions of the Cable Act are not applicable in this case the Court further concludes that it should abstain from deciding Madison's federal constitutional claims pending submission of its non-federal claims to the courts of the State of North Carolina.

Abstention is the abdication or postponement of federal jurisdiction to accommodate state court adjudication. *Cox v. Planning District I Community Mental Health and Mental Retardation Services Board*, 669 F.2d 940, 942 (4th Cir. 1982). The doctrine of abstention is founded upon the recognition that in our federal system of government the federal judiciary should accord "scrupulous regard for the rightful independence of the state governments" by avoiding needless federal conflict with state policy. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Although considered an exception and not the rule, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976), abstention has been upheld, and at times mandated, in at least four categories of cases. *See, Cox v. Planning District I, supra. See, also*, 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 4241 (1978). In *Railroad Commission v. Pullman Co., supra*, the Supreme Court held that abstention is required in cases where a federal constitutional decision might be avoided or presented in a different posture by a ruling on a dispositive matter of unsettled state law. Abstention is also proper in cases where there is a likelihood that a comprehensive state administrative process will be disrupted by federal adjudication, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), or where difficult questions of state law regarding important matters of public policy have been presented. *Colorado River Water Conservation District v. United States, supra*, 424 U.S. at 814, 96 S.Ct. at 1244, *citing, Louisiana Power and Light Co. v. City of Thibo-*

daux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). Abstention is generally required where a party seeks an injunction against ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* 54 U.S.L.W. 4860 (U.S. June 27, 1986). Finally, a federal court may abstain where there is also pending a state court litigation of the same extraordinarily important issues. *Colorado River Water Conservation District v. United States, supra.*

In its eleventh claim for relief Madison raises the difficult and unsettled issue of whether a municipality may, consistent with the Constitution and laws of the State of North Carolina, own and operate a cable television system when there are private operators willing to undertake the enterprise. Morganton contends that it is given express statutory authority to own and operate a cable television system by N.C.Gen.Stat. §§ 160A-311 and 312. A simple reading of those statutes seems to support Morganton's contention. However, Article V, Section 2(1) of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised . . . for public purposes only . . ." This limitation on the power to tax has been found to limit the power to spend from the public treasury as well. *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 143, 159 S.E.2d 745 (1968).

In *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 32-33, 199 S.E.2d 641 (1973), Justice Sharp writing for a unanimous court, stated the following rule:

> A municipal corporation, . . . even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature. (citations omitted)
>
> * * * *
>
> An activity cannot be for a public purpose unless it is properly the "business of government," and it is

> not a function of government either to engage in private business itself or to aid particular business ventures. *See* Note, 49 N.C.L. Rev. 830, 833 (1971). It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector.

In *Keeter v. Town of Lake Lure*, 264 N.C. 252, 264, 141 S.E.2d 634 (1965), the Court concluded that there could be no precise judicial definition of a public, as distinguished from a private purpose. Instead each case must be determined by its own peculiar circumstances as of the time it arises. The concept of public purpose

> expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, (citation omitted) and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public.

Mitchell v. North Carolina Industrial Development Financing Authority, supra, 273 N.C. at 144. Thus the issue of whether a proposed government expenditure is for a public or a private purpose is by its nature a matter of unsettled state law. The issue of whether Morganton may own and operate a cable television service is even more unsettled because the Supreme Court of North Carolina has not yet considered whether cable television is properly the "business of government."

In addition to its claim that state law prohibits Morganton from owning and operating a cable television system, Madison claims that Morganton's denial of its request for a franchise to operate a cable television system violates its rights under the First and Fourteenth Amendments to the Constitution of the United States. In deciding the federal constitutional issue the Court must

necessarily consider the meaning and validity of N.C. Gen.Stat. §§ 160A-311 and 312. The Supreme Court of North Carolina, if presented with the issue, might conceivably hold that insofar as N.C.Gen.Stat. §§ 160A-311 and 312 permit cities to own and operate cable television systems, the statutes are contrary to the North Carolina Constitution. It might also hold, as Plaintiff contends, that those statutes permit a city to provide cable television service to its residents only if no private operator is willing to provide such service. Of course this Court could decide the issue based upon its prediction of how the North Carolina Supreme Court would rule. But such a decision would be a tentative answer which might subsequently be displaced by an authoritative state adjudication. *Railroad Commission v. Pullman Co., supra*, at 500, 61 S.Ct. at 645.

The Court recognizes that a ruling by the North Carolina Supreme Court on the state-law issues will not necessarily be dispositive of the entire case. Morganton argues that even if it had decided against municipal ownership of a cable television system, it would not have renewed Madison's franchise. It says that it would have awarded a franchise to one of the other two applicants instead. According to the City, both Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. proposed a better system than did Madison. Therefore, even if the North Carolina Supreme Court should rule that Morganton may not provide cable television service for its residents, this Court may still have to consider whether Morganton may constitutionally deny Madison the franchise it seeks. However the posture of this action will be considerably different if the North Carolina Supreme Court holds in Madison's favor. Pullman-type abstention is therefore appropriate in this case.

Additionally, it appears that the Burford-type abstention recognized in *Louisiana Power & Light Co. v. City of Thibodaux, supra*, is proper in this case. There the the City of Thibodaux sought to expropriate certain land,

buildings, and equipment owned by the Louisiana Power & Light Company. A Louisiana statute seemed to grant the authority for the city to take the power company's property. However, a decision by the Attorney General of Louisiana in a similar case concluded that the city did not have the power claimed by the City of Thibodaux. The Louisiana Supreme Court had never interpreted the statute. The Supreme Court upheld the District Court's order of abstention on grounds that the eminent domain proceeding there in issue was "a matter close to the political interests of a State" and that the District Court had therefore appropriately exercised its discretion in staying proceedings pending authoritative interpretation of the state statute by the Supreme Court of Louisiana. *Id.* at 29-30, 79 S.Ct. at 1073-74. This holding has subsequently been determined to permit abstention where "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. United States, supra*, at 814, 96 S.Ct. at 1244.

Madison argues that the proposed municipal ownership of a cable television system violates not only the public purpose requirement of the North Carolina Constitution, but also violates the State's Unfair and Deceptive Trade Practices Act, N.C.Gen.Stat., Chap. 75, and the North Carolina Constitution's prohibitions against the granting of exclusive emoluments and privileges and against perpetuities and monopolies. N.C.Const. Art. I, §§ 32 and 34. The answers to all these questions are bound to have an impact in this State beyond the parties to this action. Any city or other local governmental unit which might consider the feasibility of owning its own cable television system would have to consider whether its proposed action would be in violation of the Constitution and laws of North Carolina. If at some time in the future the North Carolina Supreme Court decided the issues differently from the way this Court might predict it would

the rights of all future litigants would be different from the rights of these parties. *See, Louisiana Power & Light Co. v. City of Thibodaux, supra* at 30, 79 S.Ct. at 1073. Because of the potentially far-reaching impact of the answers to the state-law issues raised in this case and because these questions bear on important policy questions of sovereign prerogative, the Court concludes that Burford-type abstention is also appropriate in this case.

Whether the Court abstains under the *Pullman* doctrine or the *Burford* doctrine is of no great significance substantively. However, the procedural consequences vary significantly depending upon the basis for abstention. If abstention is based upon *Pullman* the federal district courts retain jurisdiction of the case and merely stay proceedings pending state court adjudication. *Cox v. Planning District I, supra.* But, if abstention is based upon *Burford* and its progeny the district court ordinarily dismisses the action outright. *Id.* Professors Wright, Miller and Cooper also recommend dismissal when abstention is justified under both *Pullman* and *Burford.* 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 4245 (1978).

However, as in *Cox v. Planning District I, supra,* there is present in this case primarily a question of unsettled state law. *See, also Ratcliff v. County of Buncombe,* 759 F.2d 1183 (4th Cir. 1985). The case does not involve an elaborate and comprehensive scheme of state regulation and review. Moreover, even if the North Carolina Supreme Court should rule completely in Madison's favor, that would simply put Morganton out of the cable television business. The City might then choose to award a franchise to one or more of Madison's competitors, but not to Madison, leaving Madison's First Amendment and other federal claims viable. Under all the circumstances the Court concludes that this action should be retained on the docket until the conclusion of state proceedings.

There may of course be some delay incident to the procedure proposed by the Court. That delay need not be inordinate however. The facts necessary for the determination of Plaintiff's state-law claims are essentially undisputed. The Court fully anticipates that a trial will be unnecessary in the state proceedings. The inconvenience to the parties of a short delay in the final resolution of this matter is outweighed by public benefit to be gained by an authoritative rather than a tentative resolution of the state-law issues arising in this action.

Based upon the foregoing findings and conclusions:

IT IS, THEREFORE, ORDERED that Defendants' motion to dismiss Claims 1 and 2 of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be and the same is hereby granted, and Plaintiff's First and Second Claims for Relief are hereby dismissed;

IT IS FURTHER ORDERED that Defendants' motion to dismiss Claims 3 through 12, inclusive, of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and their motion for summary judgment as to such claims pursuant to Rule 56 of the Federal Rules of Civil Procedure be and the same are hereby denied;

IT IS FURTHER ORDERED that future proceedings in this matter be stayed pending resolution of the state court proceedings contemplated by this Memorandum and Order. The Plaintiff should file its complaint in state court forthwith.

The Clerk is directed to retain this action on the Court's docket in an inactive status.

This the 3rd day of July, 1986.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

Civil Action No. SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware corporation,
Plaintiff,

vs.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY LINGERFELT, in their official capacities,
Defendants.

ORDER

[Filed Sep. 22, 1986]

THIS MATTER is before the Court upon the request of the defendant, and the Court having reviewed the file in this matter and finding that entry of an order is necessary to determine the rights of the parties during the pendency of the litigation,

IT IS, THEREFORE, ORDERED as follows:

1. Subject to further order of this Court, the terms of this Order shall apply pending a final resolution by the courts of the State of North Carolina of the action filed by plaintiff at the direction of this Court and during

the course of any subsequent proceedings before this Court.

2. Notwithstanding the expiration of plaintiff's franchise to furnish cable television service to subscribers within the jurisdiction of the City of Morganton, plaintiff shall be permitted to continue to furnish cable television service to such subscribers under the terms and conditions of the current franchise and applicable state and federal law.

3. The entry of this Order, and the parties compliance therewith, shall be without prejudice to the respective rights and legal positions of the parties, except that plaintiff's continued operations in Morganton shall be pursuant to a permissive holdover term of the current franchise.

IT IS SO ORDERED this 19th day of September, 1986.

/s/ Woodrow W. Jones
WOODROW W. JONES
United States District Judge